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EDWINA LAU

v.

EON BANK BHD

*b*HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[SUIT NO: 22-75-2002-III (I)]
12 JANUARY 2005*c*

LAND LAW: Charge - Discharge of - Land charged as security for loan - First charge fully discharged - Chargor executed second charge - Extent of chargor's liability under second charge - Whether chargee could lawfully maintain second charge on said land - Whether chargor entitled to have second charge fully discharged

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The plaintiff was the registered proprietor and chargor of certain land ('the said land') while the defendant was the chargee. The plaintiff executed memorandum of charge No. L 5214/1981 ('the first charge') to secure the sum of RM70,000 for the benefit of one Ming Construction, which was subsequently fully settled by Ming Construction in 1989. The plaintiff then executed memorandum of charge No. L 5215/1981 ('the second charge') to secure the sum of RM80,000 for the benefit of Ming Construction; the plaintiff paid a total amount of RM118,931.24 to the defendant under the second charge. The plaintiff, *vide* a letter dated 1 October 1998, wrote to the defendant, *inter alia*, seeking the discharge of the first and second charge. She contended that under the terms of the second charge, her maximum liability was the sum of RM80,000 inclusive of interest and that she was entitled to have the second charge fully discharged as she had paid the defendant a sum of RM118,931.24 by the date this action was filed. The defendant, however, submitted that under the terms of the second charge, the plaintiff was liable to pay the principal sum of RM80,000 together with interest thereon, which at 31 March 2001 amounted to RM165,880.86. Hence, the present suit by the plaintiff.

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Held (dismissing the plaintiff's claim):

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[1] There were clear indications in the first paragraph itself as well as in the other clauses found in the second charge that the words "maximum extent of RM80,000 only" referred to the maximum principal sum of the overdraft granted to Ming Construction upon which interest at the rate agreed should be levied. Whereas Ming Construction had been granted an overdraft to the maximum extent of RM80,000 only, what the plaintiff

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promised to repay to the defendant included more than just the amount of the overdraft. Thus, the maximum liability of the plaintiff under the second charge was to repay the overdraft facility of RM80,000 as well as all the other sums, including interest, stated in the charge. (pp 255 h, 256 a-b & 258 a)

[2] Even if the plaintiff had paid the defendant the sum of RM118,931.24, the plaintiff still remained indebted to the defendant under the second charge, and the plaintiff was not entitled to recover from the defendant the sum of RM38,931.24 allegedly overpaid by her, as there had been no overpayment. The defendant could also lawfully maintain the second charge on the said land and the plaintiff was not entitled to recover damages from the defendant since the second charge had not been unlawfully maintained against the said land. (p 258 b-d)

[3] Since the defendant agreed that the amount secured by the first charge had been fully discharged, it should have discharged the first charge; hence, the defendant was not entitled to maintain the first charge against the said land after 1 October 1998. However, the plaintiff was not entitled to recover damages from the defendant for maintaining the first charge on the land because the second charge had a “caveat clause” in it preventing the plaintiff from dealing with the land even if the first charge had been discharged. It was idle of the plaintiff to complain that she was prevented from exercising her proprietary rights by the first charge, when the second charge would do so as well, including after 1 October 1998. (pp 258 g-h & 259 a-e)

[4] Therefore, for all the above-mentioned reasons, this court decided in favour of the defendant and dismissed the plaintiff’s application for the orders she sought, with costs. (p 259 g)

Case(s) referred to:

Orang Kaya Menteri Paduka Wan Mahmud Isa Shukri Wan Raashid v. Kwong Yik Bank Bhd [1989] 3 MLJ 155 (foll)

Perwira Habib Bank (M) Bhd v. Lim Hong Tatt [1989] 1 CLJ 54; [1989] 2 CLJ (Rep) 246 HC (foll)

Legislation referred to:

Rules of the High Court 1980, O. 14A

For the plaintiff - Sheena Chuah; M/s Griffin & Assoc

For the defendant - Dayang Norhamimah; M/s Abdul Rahim, Sarkawi, Razak Tready, Fadillah & Co

Reported by Suresh Nathan

*a***JUDGMENT****Clement Skinner J:**

On 29 October 2003 the court, by consent, granted an order under O. 14A Rules of the High Court for the following questions of law or construction regarding the two documents described below to be determined without a full trial of the action:

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- (1) Could/can the defendant lawfully maintain Memorandum of Charge No. L 5214/1981 (for brevity “the first charge”) on Lot 51.91, Section 64, Kuching Town Land District (for brevity “the said land”)?

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- (2) If not, is the plaintiff entitled to recover damages from the defendant for unlawfully maintaining the first charge on the said land?

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- (3) What was/is the maximum liability of the plaintiff under the provisions of Memorandum of Charge No. L 5215/1981 (for brevity ‘the second charge’)?

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- (4) Having paid the defendant the sum of RM118,931.24 was/is the plaintiff still indebted to the defendant under the second charge?

- (5) If the maximum liability of the plaintiff under the second charge in the sum of RM80,000, can the plaintiff recover from the defendant the total sum of RM38,931.24 overpaid by her?

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- (6) If the plaintiff should have overpaid the defendant the total RM38,931.24 could/can the defendant lawfully maintain the second charge on the said land?

The questions posed were tried on the basis of the following agreed facts:

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- (i) The plaintiff is the registered proprietor and chargor in respect of the said land;

- (ii) The defendant is the chargee in respect of the said land;

- (iii) The plaintiff executed the first charge to secure the sum of RM70,000 for the benefit of Ming Construction;

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- (iv) The sum of RM70,000 which was secured by the first charge had been fully settled by Ming Construction in 1989;

- (v) The plaintiff executed the second charge to secure the sum of RM80,000 for the benefit of Ming Construction;

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(vi) The plaintiff had paid a total sum of RM118,931.24 to the defendant under the second charge; and a

(vii) The plaintiff's then Advocates, Messrs. Chan Kho Poh & Co., *vide* their letter dated 1 October 1998, wrote to the defendant, *inter alia* to discharge the first and second charge. b

The agreed documents for the purpose of these questions being determined were:

A. Memorandum of Charge Instrument No. L 5214/1981;

B. Memorandum of Charge Instrument No. L 5215/1981; c

C. Letter from plaintiff to Oriental Bank Berhad dated 5 September 1996;

D. Letter from Messrs. Chan Kho Poh & Co. to the Oriental Bank Berhad dated 1 October 1998; and d

E. Letter from Messrs. Chan Kho Poh & Co. to the Oriental Bank Berhad dated 3 December 1998.

Although seven questions were posed for decision of the court, it is really the third question that is at the heart of the dispute between the plaintiff and defendant. The answer to that question effectively answers fourth, fifth, sixth and seventh questions posed, and has a bearing as well on the answers to the first and second questions posed. e

The dispute leading to these questions being posed to court has arisen because the plaintiff maintains that under the terms of the second charge her maximum liability is the sum of RM80,000 inclusive of interest and that she is entitled to have the second charge fully discharged as she has paid to the defendant a sum of RM118,931.24, by the date this action was filed. f

The defendant takes just the opposite stand. It maintains that under the terms of the second charge the plaintiff is liable to pay the principal sum of RM80,000 together with interest thereon, which at 31 March 2001 amounted to some RM165,880.86. Therefore, according to the defendant, the plaintiff is not entitled to have any of the questions posed, answered in her favour. g

I will now consider the third question posed, first. h

The contractual relationship between the plaintiff and the defendant having been reduced into writing in the form of a memorandum of charge, the extent of the plaintiff's liability under the second charge must depend on what the parties had agreed to in the memorandum of charge. i

- a* In support of her case the plaintiff relies solely on the terms stated in the first paragraph of the second charge. I will set it out in full; it reads:

b I EDWINA LAU of ... (hereafter called 'the Chargor') being the registered proprietress of the land and building thereon hereinafter described in consideration of the ORIENTAL BANK BERHAD, ... (hereinafter called 'the Chargee') granting and continuing to grant accommodation to MING CONSTRUCTION ... (hereinafter referred to as 'the said Firm') by way of SECURED OVER-DRAFT or otherwise up to a maximum extent of Malaysian Dollars Eighty Thousand Only (RM80,000.00) subject to yearly review DO

c HEREBY PROMISE TO REPAY the same on demand or to repay the balance which at the date of such demand shall then be owing to the Chargee by the said firm whether in respect of cheques bills or notes drawn accepted or endorsed by the said firm and discounted paid or held by the Chargee or for advances made to the said firm or for its use or accommodation or at its request or for liabilities incurred to the Chargee by it including interest at the rate and in the manner hereinafter mentioned calculated on daily balance with monthly

d rests, commission and other customary banking charges together with the cost of the preparation execution stamping and registration of this charge of the premium of fire insurance in respect of the said land and building and also to pay interest at the said rate and in the manner hereinafter mentioned on such balance from the date of such demand until payment. (emphasis added).

- e* Relying on the words 'up to a maximum extent of RM80,000 only' appearing in the first paragraph of the second charge, the plaintiff contends that her maximum liability inclusive of interest, is limited to RM80,000 only. It is the plaintiff's submission that in the absence of any express provision to the contrary in the second charge, such limit of the overdraft facility would cover both principal and interest. Otherwise, according to the plaintiff, wording like
- f* 'together with interest' or 'for principal only' would have followed the words 'up to the maximum extent of RM80,000 only'.

- Counsel for the plaintiff submitted that the second charge, like a guarantee, must be construed strictly according to its terms and referred to *Orang Kaya Menteri Paduka Wan Mahmud Isa Shukri bin Wan Rashid v. Kwong Yik Bank Berhad* [1989] 3 MLJ 155, where it was held by the Supreme Court that:
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- The first thing to do is to look at the letter of guarantee. The liability of the guarantor depends very much on the language of the instrument and the nature of the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligations by the creditor, and cannot be made
- h* liable for more than he has undertaken.

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I think counsel for the plaintiff relies on the *Orang Kaya* case for the general proposition that in determining the liability that arises under a contract in writing, much will depend on the language of the instrument and the nature of the liability it creates. I accept what the Supreme Court said on the matter in the *Orang Kaya* case.

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Accordingly, counsel for the plaintiff interpreted the liability of the plaintiff under the second charge as being:

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The plaintiff was to pay the defendant on demand:

(i) 'the same', which is the overdraft facility 'up to a maximum extent of RM80,000 only'; OR

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(ii) 'the balance' of the overdraft facility 'up to a maximum extent of RM80,000 only', including, *inter alia*, interest.

Counsel for the plaintiff submitted that the words 'the balance' appearing in the first paragraph of the second charge would be lesser than the full overdraft facility 'up to the maximum extent of RM80,000 only'.

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Counsel also submitted that the following words which relate to the payment of interest namely, 'and also to pay interest at the said rate and in the manner hereinafter mentioned on such balance from the date of such demand until payment' which are found in the last 3 lines of the first paragraph of the second charge, provides for the liability of the plaintiff to pay post-demand interest on the balance of the overdraft facility, but because of the absence of words like 'together with interest' after the above quoted words, the plaintiff would only be liable for the balance and post-demand interest up to the limit of RM80,000 only.

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It was also submitted that if there is any ambiguity in the terms of the second charge, that ambiguity must be resolved in favour of the plaintiff in accordance with the '*contra proferentem*' rule, since it was the defendant who prepared the memorandum of charge for execution.

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I cannot agree with the plaintiff's interpretation of her liability under the second charge nor do I find its terms ambiguous, and I say so for the following reasons.

In the first place, although words such as 'together with interest' or 'for principal only' do not appear or were not used immediately after the words 'up to a maximum extent of RM80,000 only', there are clear indications in the first paragraph itself as well as in the other clauses found in the second

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- a* charge that the words ‘maximum extent of RM80,000 only’ refer to or mean the maximum principal sum of the overdraft granted to Ming Construction upon which interest at the rate agreed shall be levied.

- b* The clear indication which I refer to can be obtained from reading the first paragraph as a whole. When done, it will be seen that whereas Ming Construction had been granted an overdraft to the maximum extent of RM80,000 only, what the plaintiff promised to repay to the defendant included more than just the amount of the overdraft. Thus the plaintiff’s obligations as stated in the first paragraph included a promise to repay not only the sum of RM80,000 or the balance which on the date of demand was owing, but also
- c* the following sums: (a) interest at the rate and in the manner stated in the charge calculated on daily balance with monthly rests; (b) commission and other customary banking charges; (c) the costs of the preparation, execution, stamping and registration of the charge; (d) the premium of fire insurance in respect of the said land and building.

- d* The obligation to pay those sums mentioned in (a), (b), (c) and (d) above is imposed by the word ‘including’ found at line 22 of the first paragraph. Clearly, if the plaintiff’s promise included her obligation to pay the sums mentioned in (a), (b), (c) and (d) in addition to the RM80,000 or the balance due on the date of demand, the words ‘maximum extent of RM80,000 only’
- e* must mean or refer to only the maximum principal sum granted by way of overdraft.

- f* The same line of argument that was raised by the plaintiff here was also taken in *Perwira Habib Bank (M) Bhd. v. Lim Hong Tatt* [1989] 1 CLJ 54; [1989] 2 CLJ (Rep) 246. In that case the defendant was granted an overdraft facility limited to RM750,000 with interest chargeable at 14.5% per annum, calculated on the daily outstanding amount and payable monthly. On an application for summary judgment against him for RM864,166.72, one of the issues raised by the defendant there was that as the overdraft was limited to RM750,000
- g* included interest, the plaintiff there was not entitled to claim more than that sum. Siti Norma Yaacob J (as she then was) held that the limit of the facility can only mean the maximum principal sum sanctioned by the overdraft on which interest at the rate agreed shall be levied. Her Ladyship further said, ‘To assume that the RM750,000 limit includes interest as well would be
- h* contrary to logic and sound business practice, as the facility is a business transaction conducted by the plaintiffs in the course of their business as banker. As such it is not logical to expect the plaintiffs to advance money up to the sanctioned limit on an interest free basis’. So too here, if, as the plaintiff contends, the maximum extent of the overdraft includes interest, it would be

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illogical and contrary to the defendant's business as bankers to advance money up to the maximum extent on an interest free basis. Accordingly, here too, the maximum extent of the overdraft must necessarily mean the maximum principal sum sanctioned by the overdraft on which interest at the agreed rate is to be levied.

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In the second place, the plaintiff has confined herself to only one paragraph of the second charge in interpreting the document, whereas it is a rule of construction of a document that it must be read as a whole with all its terms considered together and not in isolation.

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If the second charge is read as a whole, it will be seen that there are other clauses that clearly indicate that the maximum extent of the overdraft of RM80,000 did not include interest as well. The other clauses I refer to are:

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(a) Clause (iv) on the third page, which reads:

Any non-repayment of interest will be capitalised and added to the outstanding principal sum.

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If as the plaintiff contends, the principal sum of RM80,000 includes interest, then the contract will not provide that any non-repayment of interest will be capitalised and added to the outstanding principal sum;

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(b) The security clause at p. 3 of the second charge which reads:

AND as security for the above sum and interest or for all or any moneys that may become payable hereunder, I, the Chargor hereby charge to the Chargee all my undivided right title

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The words 'above sum' in this clause must refer to the overdraft of RM80,000. If that sum is inclusive of interest as contended by the plaintiff, then there would be no need for the words 'and interest' that follow. Further, when the plaintiff agreed to give the said land as security for not only the RM80,000 but also for 'interest or for all or any moneys that may become payable hereunder', this reinforces the view that the words 'maximum extent' meant the maximum principal sum lent by way of overdraft, which did not include interest.

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(c) The same may be said about cl. 17(a) and (b) where the words '... of the principal sum hereby secured and all other moneys payable under this charge including interest thereon ...' and 'that upon complete payment of all monies hereby secured including interests accrued thereon ...' are used. If as contended, the sum of RM80,000 includes interest as well, then there would be no need to refer to the 'interest thereon'.

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a So I would answer the first question posed as follows:

The maximum liability of the plaintiff under the second charge was to repay the overdraft facility of RM80,000 as well as all the other sums including interest, stated in the charge.

b It must follow from my decision on the third question posed, that the fourth and fifth questions must be answered against the plaintiff ie, even if the plaintiff had paid the defendant the sum of RM118,931.24, the plaintiff still remains indebted to the defendant under the second charge, and, the plaintiff is not entitled to recover from the defendant the sum of RM38,931.24 allegedly overpaid by her, as there has been no overpayment.

c It must also follow that the sixth question posed must be answered in favour of the defendant ie, it can lawfully maintain the second charge on the said land as there has been no overpayment by the plaintiff.

d Likewise, the seventh question posed must also be answered against the plaintiff ie, she is not entitled to recover damages from the defendant as the second charge has not been unlawfully maintained against the said land.

e I will now consider the first and second questions posed, both of which relate to the first charge. Even though the amount secured by the first charge has been fully repaid, cl. 17 states:

That upon complete payment by the Chargor of all monies hereby secured including interest accrued thereon (if any) the Chargee shall at the request and cost of the Chargor, duly discharge this security.

f Clause 17 has two limbs, both of which must be satisfied to obtain a discharge of the charge. There must first be complete payment, followed by a request for discharge of the charge. It is an agreed fact that the plaintiff's lawyers wrote to the defendant on 1 December 1998 requesting for a discharge of the first charge, but it was the submission of counsel for the defendant that since that letter requested for both the first and second charges to be discharged, the defendant was entitled not to discharge the first charge. I do not think the defendant can rely on such a flimsy excuse for refusing to do so. Since the defendant agrees that the amount secured by the first charge had been fully discharged, it should have discharged the first charge since a request, whether

g in the form of a joint request or otherwise, still constitutes a request within the meaning of that word in cl. 17. So I would answer the first question posed by saying that the defendant was not entitled to maintain the first charge against the said land after 1 October 1998.

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Does it follow then that the plaintiff is entitled to recover damages from the defendant for maintaining the first charge on the said land, which is the second question posed? For the reasons that follow, the plaintiff would not. The plaintiff complains that because the first charge was not discharged, she has been unable to exercise her proprietary rights over the said land by virtue of what is popularly referred to as the 'caveat clause' in the first charge which prevents her from doing so. The caveat clause she refers to is cl. 17 which reads:

I, the registered proprietress and the Chargee, hereby agree that during the period of this charge no dealing shall be registered against the said land unless the Chargee has given its consent to such registration.

I do not agree with the plaintiff's argument that it is the caveat clause in the first charge that prevents her from dealing with the said land. The flaw in that argument is that in reality it is the second charge which prevents the plaintiff from dealing with the said land because even if the first charge is discharged, the plaintiff would still not be able to exercise her proprietary rights over the said land because the second charge also has a 'caveat clause' in it. A perusal of both charges shows that the first and second charge were registered on the same day at the Kuching Land Registry Office ie, on 30 May 1981 and the second charge was registered only two minutes later than the first charge. What this means is that the caveat clause in the second charge was already operative to prevent the plaintiff from dealing with the said land from the very beginning and so it is idle of the plaintiff to complain that she is prevented from exercising her proprietary rights by the first charge, when in fact it is the second charge that would do so as well, including after 1 October 1998.

It was for all the above reasons that when I tried the issues on 12 November 2004 I decided in favour of the defendant and dismissed the plaintiff's application for the orders she sought, with costs. It must also follow that the issues having been decided, the plaintiff's claim in the suit must be dismissed.